

EC-G-1999-065

OSWER (E) 9833.0

GUIDANCE MEMORANDUM
ON
USE AND ISSUANCE OF ADMINISTRATIVE ORDERS
UNDER
SECTION 106 (a)
OF CERCLA

Received

JAN 28 2000

Enforcement & Compliance Docket
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

MEMORANDUM

SUBJECT: Guidance Memorandum on Use and Issuance of
Administrative Orders Under §106(a) of CERCLA

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I. Introduction

The administrative order authority which the Environmental Protection Agency (EPA) exercises under §106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) and Executive Order 12316 is one of the most potent administrative remedies available to the Agency under any existing environmental statute.

Section 106(a) of CERCLA authorizes the issuance of "such orders as may be necessary to protect public health and welfare and the environment," after notice to the affected state, upon a determination that "there may be an imminent and substantial

endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." A fine not exceeding \$5,000 per day may be imposed for willful violation, failure or refusal to comply with a §106(a) Order (Order), and punitive damages of up to three times the cost of clean-up of the site may be imposed under §107(c)(3) for failure, without sufficient cause, to properly provide removal or remedial action pursuant to such an Order. In view of the magnitude of these penalties, the Agency expects that the regulated community will comply with administrative Orders. At the same time, the Agency's obligation is to ensure that Orders are properly issued.

It is the current policy of EPA that, whenever possible, parties who have caused or contributed to a release or a threat of a release of hazardous substances at a site should rectify the problems at the site. This action is necessary to ensure that the Agency efficiently manages the limited funds available under CERCLA and to ensure that the maximum number of sites are addressed.

Accordingly, after the Agency discovers a site and in advance of completing a Remedial Investigation and Feasibility Study (RI/FS), (and has conducted an endangerment assessment, or their equivalent), responsible parties normally will be sent a notice letter requesting them to clean up the site. Following completion of the feasibility study, the Agency normally engages in discussion with responsible parties in an attempt to obtain

promptly the agreement of such parties to voluntarily undertake the necessary response actions. If the discussions are successful, the terms of the agreement will be embodied in a judicial consent decree or a §106 administrative consent Order.

In circumstances where the Agency wishes to compel a responsible party to undertake the response actions, including instances where no settlement can be reached, the Agency will consider issuing a unilateral §106 Order in accordance with this guidance.

The administrative enforcement authority is an important component of the Agency's enforcement program authorized under CERCLA. This guidance is being issued to assist the regional offices in developing and maintaining an effective CERCLA administrative enforcement program. The effectiveness of the program will be enhanced as site remedies are implemented by Respondents in compliance with administrative orders, and as enforcement of Orders with which Respondents are not in compliance is successfully and expeditiously pursued by EPA. The Agency will aggressively defend judicial challenges to Orders and enforce instances of non-compliance to validate the CERCLA administrative enforcement program. Regional offices should issue Orders consistent with the criteria and procedures contained in this guidance to ensure the legal sufficiency of the program.

The §106 administrative order authority provides strong incentives for Respondents to undertake expeditiously response

actions deemed necessary by EPA to ensure protection of public health or welfare or the environment. Therefore, Regional Offices are urged to consider the use of unilateral CERCLA administrative orders in every case where compelling enforcement authority is necessary. Criteria are provided herein to assist regional offices in determining whether Orders are appropriate in any case. It is essential that a balanced ^{CERCLA} ??? enforcement program is implemented by EPA, combining administrative and judicial enforcement authorities, to ensure protection of health and the environment from the hazards of releases or threats of releases of hazardous substances. ✓

II. Requirements for Issuance and Scope of Section 106 CERCLA Orders

A comparison of §106(a) and §7003 of the Resource Conservation and Recovery Act (RCRA) reveals similarities in the two sections, and therefore many of the criteria for issuance of a §7003 Order also apply to §106 Orders.¹ In many situations, either Order would be appropriate. Where the hazardous substances are also "hazardous waste" under RCRA, the Order should cite the authority of both sections.

Section 106(a) of CERCLA provides as follows:

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or

¹Guidance on the Use of RCRA §7003 administrative orders may be found in a memorandum entitled, "Issuance of Administrative Orders Under Section 7003 of the Resource Conservation and Recovery Act" dated September 11, 1981. ✓

threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat... The President may also, after notice to the affected State, take such action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.²

In order for an Order to be issued, the following legal prerequisites must be met:

A. Necessity for a Determination Based Upon Evidence

A determination must be made that, because of a release or threat of a release, an imminent and substantial endangerment may exist. This determination will depend upon documentary, testimonial, and physical evidence obtained through investigations and inspections. Other information concerning the nature of the threat posed by a site may already be contained in Agency files, such as data generated pursuant to §103 of CERCLA or the permit and notification sections of RCRA. The Order, therefore, must include a finding that an imminent and substantial endangerment may exist, in order to ensure that this statutory requirement is met. (See sample order, Appendix b, Finding No. 7).

²The President has delegated his authority under this Section to the Administrator of EPA and the U.S. Coast Guard by Executive Order No. 12316 dated August 24, 1981. EPA and the Coast Guard have entered into a Memorandum of Agreement dated October 9, 1981, that all site-related releases in the Coast Guard's jurisdictional areas (coastal zones, Great Lakes, ports and Harbors) shall be the responsibility of EPA.

B. Necessity for Actual or Threatened Release of Hazardous

Substance

that the imminent and substantial endangerment
be caused by "an actual
Section 106 requires ~~??????-???~~ or threatened release³

of a hazardous substance from a facility. A "hazardous substance" is defined in Section 101(14) of CERCLA, and is generally any substance, waste or pollutant designated pursuant to Sections ^{307(a)} ~~?????~~ and ^{311(b)(2)} ~~?????~~ (A) of the Clean Water Act, Section ³⁰¹ ~~?????~~ of PCRA, Section 112 of the Clean Air Act. Section ⁷ ~~?????~~ of TSCA or Section ¹⁰² ~~?????~~ of CERCLA. (Crude oil, ^{fractions thereof} ~~?????~~, natural gas, and liquified natural gas are exempted from statutory coverage.)

Whether a release from a facility is "actual" or "threatened" primarily depends upon temporal considerations. Actual releases should be observable in some form, either visually or through analysis showing contaminants present in samples of soil, water or air. A "threat" of a release, on the other hand, involves releases which have yet to occur or have yet to find their way into the environment. A bulging tank containing a hazardous substance in which pressure has built up, and a surface impoundment which is about to overflow because of heavy rainfall, present obvious threats of a release. A threat is also presented by corroding or leaking drums containing incompatible wastes mingled in a common area. Accordingly, the

³A "release is defined in CERCLA S101(22) as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, ejecting, escaping, leaching, dumping or disposing into the environment," with certain specific exemptions (e.g. release solely in work place; engine exhaust; release of certain nuclear material; and normal application of fertilizer).

determination of whether a "threat" of a release warrants issuance of an Order is a judgement decision to be made on a case-by-case basis.

The nature of both the hazardous substances present at the site and the release or threat of release should be set forth as findings in the order, together with the bases for such findings.

C. Necessity That Release or Threat of Release be From a Facility

The release or threat of release must be from a "facility," which is defined in CERCLA §101(9) as:

(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel (a watercraft or other contrivance used, or capable of being used, as a means of transportation on water).

This definition of "facility" includes on-shore or off-shore sites, including land transportation facilities, from which releases or threats might originate. The Order must specify the physical location that is the source of the release.

D. Necessity for Existence of Imminent and Substantial Endangerment

Evidence presented to support the issuance of a §106(a) order must show "that there may be an imminent and substantial endangerment" to public health or welfare or the environment.

The words "may be" indicate that Congress established a standard of proof that does not require a certainty. The

evidence need not demonstrate that an imminent and substantial endangerment to public health or the environment definitely exists. Instead, an Order may be issued if there is sound reason to believe that such an endangerment may exist.

Evidence of actual harm is not required. As the Court stated in Ethyl Corp. v. EPA, construing an endangerment provision in the Clean Air Act:

The meaning of "endanger" is not disputed. Case law and dictionary definition agree that endanger means something less than actual harm. When one is endangered, harm is threatened; no actual injury need ever occur. (541 F.2d 1 at 13, footnotes omitted, original emphasis, D.C. Cir., cert. den. 426 U.S. 941 (1976).)

It should also be noted while the risk of harm must be imminent in order for the Agency to act under §106, the harm itself need not be. (See the legislative history to the "imminent and substantial endangerment" provision of §1431 of the Safe Drinking Water Act, H. Rpt. 93-1185 at 35-36.) For example, EPA could act if there exists a likelihood that contaminants might be introduced into a water supply which could cause damage after a period of latency. One must judge the risk or likelihood of the harm by examining the factual circumstances, including, but not limited to: 1) nature and amount of hazardous substance involved. 2) the potential for exposure of humans or the environment to the substance, and 3) the known or suspected effects of the substance on humans or that part of the environment subject to exposure to the substance.

Legal analyses of the concept of imminent and substantial

endangerment can also be found in Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975); U.S. v. Vertac Chemical Co. et al, 429 F.Supp. ⁸⁷⁰~~222~~ (E.D. Ark. 1980); U.S. v. Solvents Recovery Service, 496 F. Supp. 1127 (D. Conn. 1980); U.S. v. Midwest Solvents Recovery, 484 F. Supp. 138 (N.D. Ind. 1980); U.S. v. Diamond Shamrock Corp., 17 E.R. 1329 (N.D. Ohio 1981); U.S. v. Price, 688 F. 2d 204 (3rd Cir. 1982); U.S. v. Reilly Tar and Chemical Corp., 546 F. Supp 1100 (D. Minn. 1982).

The nature of the endangerment and the basis for the finding of an imminent and substantial endangerment must be set forth in the Order. The link between the endangerment and the relief mandated by the Order should also be evident.

E. Notice to Affected States

Finally, before an Order may be issued, the "affected state" must be given notice of the Agency's intention to issue the Order.

The Agency is not held to a statutory period of time for notice. Normally, written notification to the state should precede federal action by at least one week. Circumstances may arise, however, where rapid response at a site is necessary. In such cases, issuance of an Order may follow an abbreviated notice period or even a telephone call made by EPA to the Director of the agency responsible for environmental protection in the affected state. Written confirmation must follow such telephone notice.

As indicated above, the notification should be directed to

the Director of the state agency having jurisdiction over hazardous waste matters. A suggested form for a notification letter is attached to this memorandum as Appendix A. This form also provides the format for oral notice.

An "affected state" is interpreted to be the state where the facility is located from which the discharge is being released or threatens to be released, and in which the response activity required by the proposed order will be taken. In some cases, this may involve more than one state, such as where the facility is located near the border of a state and the hazardous substances have migrated from the facility located in one state into another state(s). In those cases, all of the states in which the hazardous substances are found and in which response activity may be performed pursuant to the order should be notified.

III. Persons To Whom an Order May Be Issued

Section 106 does not specify any person or persons to whom an Order may be issued, but permits the issuance of "such orders as may be necessary." Section 104(a), however, refers to the "owner or operator" or "other responsible party" as the persons to whom the Agency could look to determine whether clean-up of a site will be done properly before expending CERCLA funds. Section 107(a), designating those who shall be liable for response costs, specifies present owners and operators of a facility, persons who were owners and operators at the time of disposal of a hazardous substance, and generators and certain

transporters who, according to available evidence, contributed hazardous substances to the facility. It follows that those same persons could be recipients of an Order issued under Section 106(a), (see U.S. v. Outboard Marine Corp., 556 F. Supp. 54, 57 (N.D. Ill. 1982)). In addition, in appropriate cases, it may be possible to issue orders to parties other than those listed in Section 107(a), if actions by such parties are necessary to protect the public or the environment.

IV. Criteria for Issuance of §106 Orders

Other parts of this guidance document examine the legal requirements for issuing an Order. This section's purpose is to list specific factors which favor the use of Orders over other possible enforcement responses. These factors include:

- Responsible parties' financial status
- Number of potentially responsible parties
- Certainty of the necessary response action
- Agency's readiness to litigate the merits of the Order.

The theme common to these factors is that Orders should be issued in those situations in which compliance with the terms of the Order is feasible, i.e., where the Respondents are in a position to perform the ordered response actions within specified time periods. This does not mean EPA must make a pre-issuance determination that Respondents will comply with an Order, but rather that compliance is practicable. If the Agency does not anticipate compliance with an Order it is considering issuing, the use of the Order may serve only to delay direct injunctive

action under §106 or the initiation of Fund-financed response. On the other hand, the Agency may wish to issue an Order in any situation where the needed response action and the liability therefore are clear and straight-forward, so that refusal to comply with the terms of the Order would not, in all probability, be with "sufficient cause" (CERCLA §107(c)(3)). Such refusal would render the Respondent liable for civil penalties or punitive damages in the event of federal cleanup.

A. Responsible Parties' Financial Status

Before an administrative order requiring remedial work is issued, the Agency should assess, to the extent possible, whether the responsible party has sufficient financial resources to comply with the Order. Financial information is available from several sources:

- Agency files contain financial information collected as part of the identification of parties responsible for the hazards posed by sites on the National Priorities List.
- The Securities and Exchange Commission (SEC) requires publicly traded companies to submit detailed financial statements. This information is publicly available. (Consult NEIC's manual entitled "Identifying Responsible Parties" for additional information on obtaining SEC files.)
- Responsible parties may submit financial information to the Agency during discussions or negotiations held

prior to the issuance of and Order.

In addition, NEIC can provide further information on Respondent's financial ^{status} ✓

B. Number of Responsible Parties Subject to the Order

For two primary reasons, the success of Orders for remedial action is enhanced where there are relatively few responsible parties.

1) Coordination of Response Action

An Order issued to multiple Respondents who are jointly and severally liable generally will not allocate individual clean up responsibilities.⁴ Instead, the Order will require the same response action to be conducted by each responsible party. Multiple parties must organize and coordinate their response to ensure compliance with the Order's requirements. Thus, compliance with Orders may depend upon group agreement of each member's share of the response cost. In a large group of responsible parties, it may be difficult for the group to develop a consensus on individual liability and perform response activities as quickly as necessary to abate imminent hazard conditions at a site. Accordingly, issuing Orders to all responsible parties may not be appropriate where there are a large number of parties who are unlikely to agree on a concerted response. Instead, the Agency will pursue judicial remedies or

⁴However, the Agency may issue an Order to a Respondent requiring a response to a discrete, separable aspect of the hazard at a site, notwithstanding the existence of other responsible parties or other less divisible problem areas.

consider issuing Orders to a selected subset of responsible parties.

Even in situations where Orders are issued to a large number or parties, Agency policy, which should be reflected in the terms of the Order, is that each Respondent is individually liable for compliance with the Order's requirements. Individual liability also extends to penalties and punitive damages imposed by CERCLA for failure to comply with the Order.

2) Supervision

After an Order is issued, the Agency conducts compliance monitoring at the site to ensure that responsible parties comply with the terms of the Order. Although no maximum number of responsible parties can be specified as optimum, it is clear that the Agency's oversight responsibility is most effectively accomplished where there are a limited number of responsible parties.

C. Specificity of the Necessary Response Action

In order to minimize the potential for confusion between Respondents and the Agency concerning the required response action, Orders should be used in situations where the nature of the required response action has been relatively precisely identified. Orders are normally better suited to mandating discrete tasks such as ~~removals~~ removals rather than less exact actions such as planning. Otherwise it may be difficult for the Agency to supervise compliance activities, and for responsible parties to reach agreement on a compliance plan. In most cases,

information sufficient to describe the required response actions will be generated by the RI/FS.

An Order should contain the following elements (see Appendix B):

- The steps the Respondent must take to comply with the Order;
- The effective date of the Order;
- A mandatory time-table for completion of remedial work; and, where appropriate,
- A statement to the effect that other actions or orders may follow.

Specific remedial action Orders benefit both the Agency and responsible parties. Responsible parties are provided clearly defined compliance standards which will facilitate agreement among the responsible parties on a remedial plan. If the responsible parties then determine that the remedial work is best accomplished by a third party contractor, the Order provides a basis for their contract negotiations.

Specific Orders benefit the Agency by reducing the difficulty of supervision and judicial enforcement. In noncompliance situations, the Agency may seek to enforce an Order in court. A specific Order provides the court with Agency-articulated standards by which to judge the responsible party's non-compliance with its terms. Therefore, EPA should make every effort to clearly articulate the response activities required by an Order.

D. Agency's Readiness to Litigate the Merits of the Order

After the Agency issues an Order, the respondent may seek judicial review to stay the Order. Respondents may challenge their liability or the appropriateness of the remedy specified in the Order. On the other hand, the Agency may promptly seek to enforce the Order in court. In light of these possibilities, the Agency must be ready to defend the Order in court at the time it is issued. This means that the site problem, the reasonableness of the required response, evidence of liability, and the Agency's response to issues raised by the recipient must be thoroughly documented, and that the documentation be organized and easily retrievable. The documentation will constitute the administrative record for any litigation.

E. Competing Considerations

The absence of the factors listed above may argue in favor of pursuing a judicial or Fund-financed, rather than an administrative, remedy. For example, EPA should not normally issue an order if the necessary response actions have not been clearly identified. In addition, Agency enforcement personnel should strongly consider the judicial course of action if:

- the responsible parties have violated provisions in several environmental statutes;
- the opportunity for public comment on the terms of a settlement agreement warrants the use of a judicial consent decree, (where there is a 30-day comment period

before the decree is finalized)⁵; and

- there is a need for long term court oversight of a settlement agreement, (such as in cases where an agreement calls for separately enforceable response milestones prior to completion of the cleanup).

V. Orders Relating to Removals and Remedial Actions

Guidance on conducting removal actions issued by the Office of Emergency and Remedial Response (OERR) divides the statutory concept of removals into "immediate" and "planned" removals.

A. Immediate Removals

Immediate removal actions are to be taken only if a response is needed within a relatively short time frame to prevent or mitigate significant harm to human health or the environment, and such action will not otherwise be provided on a timely basis.

Orders may be used to compel various immediate removal measures, including:

1. Suspension of activities which aggravate an existing release or substantial threat of a release (e.g., active use of a storage tank judged by the OSC to be in imminent danger of failure).
2. Suspension of activities which interfere with Federal removal actions (e.g., plant traffic in area of cleanup).

⁵However, it should be noted that the Agency is exploring mechanisms which provide for public comment on both unilateral and consent administrative Orders. Guidance on this matter will be provided at a later date.

3. Movement or non-movement of a transport vehicle (railway tank car, tank truck, tank vessel) which is the source of a release or substantial threat of a release.
4. Measures to limit access, such as fencing.
5. Use of readily available equipment, owned by the responsible party, to contain or remove a release during the initial stages of a response before the OSC is able to obtain comparable equipment from other sources.
6. Dikeing; construction of berms; or removal of the hazardous substance to an approved facility.

(This list illustrates various uses for an Order; it is not an exclusive compendium.)

Section 106(a) Orders, both in immediate and non-immediate situations, must contain a statement notifying the party of EPA's authority and the liability that may be incurred by failure to comply. As specifically as possible the Order prescribes the response activity and sets the date for its completion. To ensure enforceability of the Order, EPA should not undertake its own CERCLA-funded response activity during the period of time given to the party to respond, unless (i) such CERCLA-funded response activity becomes necessary due to the immediacy of the release or threat of release or (ii) the Respondent formally and unequivocally states an unwillingness to comply with the Order. In the event the party undertakes response activity, the OSC

should remain on-site to ensure that the work is being conducted in accordance with the Order.

B. Planned Removals and Remedial Actions

Planned removal situations are those that allow several days or weeks to execute the response. Remedial actions, on the other hand, are generally those intended to provide a permanent resolution to the release and require a longer time and more expensive efforts to implement.

As in the case of immediate removals, an Order is available to compel response measures routinely taken during planned removal and remedial actions. "Removal activity" includes assessment programs to evaluate the nature of the problem, and removal of material from the site. "Remedial actions" are those consistent with a permanent remedy, and include such activity as capping the area, trenching, and provision of an alternate water supply.⁶ EPA's position is that any activity that the Government might undertake at a site - from planning and studies to complete cleanup-could be ordered pursuant to §106(a). Of course, the issuance of more than one Order may be necessary if the cleanup is performed in stages, or if additional responsible parties become known to EPA who should participate in the cleanup.

VI. Procedures for Issuance of §106(a) Orders.

CERCLA designates the President as the primary official

⁶See §101(23) of CERCLA for definition of "remove" or "removal", and §101(24) of CERCLA for definition of "remedy" or "remedial action". Those definitions contain detailed examples of the types of activities that fall within these categories.

responsible for taking response and enforcement action under the Act. The authority to issue administrative orders under §106(a) has been delegated to the Administrator of EPA by Executive Order No. 12316, and redelegated by the Administrator to the Regional Administrators and the Assistant Administrator for Solid Waste and Emergency Response (AA-OSWER). The RAs and the AA-OSWER must consult with the Associate Administrator for Legal and Enforcement Counsel (AA-OLEC) prior to exercising this authority, and the RAs must obtain advance concurrence from the AA-OSWER. (See Delegations Manual: 14-14.) The AA-OLEC has redelegated the consultation authority to the Associate Enforcement Counsel-Waste and the Regional Counsels. The AA-OSWER has redelegated his advance concurrence authority to the Director, Office of Waste Programs Enforcement (OWPE). The Office of Waste Programs Enforcement will develop and issue criteria in separate guidance which will be used to evaluate circumstances under which this advance concurrence requirement will be waived on a Region by Region basis. Regional offices are expected to develop strong administrative enforcement programs, on an expeditious schedule, which will permit them to initiate and issue legally and technically adequate administrative orders with only prior notice to Headquarters.

A. Planned Removals and Remedial Actions

For planned removals and remedial actions, Orders are drafted by the Regional program office with the cooperation of the Regional Counsel's office. The draft Order is forwarded to

the Office of Waste Programs Enforcement for review and concurrence. The Regional Administrators will usually issue the Order and provide prior notice of the action to the state.

B. Immediate Removals

For those Orders which require emergency or quick handling, usually in response to situations warranting an immediate removal, the following approval sequence will be used:

The Regional Administrator first must determine whether to issue an Order based on communication with the OSC and consultation with Regional Counsel. The Region then prepares an order with any supporting information and electronically transmits the material to the Office of Waste Programs Enforcement for review and concurrence. Notification to the State of our intent to issue the Order should be accomplished orally, and followed up by formal written notice.

VII. Opportunity to Confer

Agency policy is to offer parties to whom EPA has issued a unilateral §106 Order an opportunity to confer with the Agency concerning the appropriateness of its terms and its applicability to the recipient. The conference will help EPA ensure that it has based its Order on complete and accurate information and help EPA and Respondents reach a common understanding of how the Order should be implemented or modified. The procedures for exercising this option are communicated to respondents through the text of the Order itself. (See sample Order, page 4 of Appendix B.)

A. Planned Removals and Remedial Actions

Each Order will specify a date when the Order becomes effective. For actions other than immediate removals, the effective date should ordinarily be twenty calendar days from the day the Order is received by the Respondent. Certain Orders, such as those requiring that long term remedial actions be taken, may warrant a more extensive examination of the facts. In such cases, the Order may specify an effective date more than twenty days removed to permit the Respondent an opportunity to discuss the Order with the Agency beyond that accorded by the procedures set forth in Subpart C below.

If the Respondent seeks to confer with the Agency about the Order, the Respondent must provide written notification to the EPA official listed in the Order within ten calendar days of the date of receipt. The conference should be scheduled and held as soon thereafter as practicable, but prior to twenty days from the date the Order was received by the Respondent.

B. Emergency Situations

The applicable time periods for the effective date and for requesting a conference may be shortened, (e.g., to 72 and 48 hours respectively), or the conference procedures may be eliminated entirely, if the immediacy of the hazard posed by a site and other surrounding circumstances so warrant. In the former situation, the Order should permit the Respondent to request a conference orally, later followed by written notification.

C. Conference Procedures

The conference will normally be held at the appropriate EPA Regional office and will be presided over by the Regional Administrator's designee. However, other arrangements may be agreed to for the sake of convenience to the parties. At the conference, EPA should be prepared to provide the Respondent with information sufficient to explain the basis for the Order and to promote constructive discussions. The Respondent will have the opportunity to ask questions and present its views through legal counsel or technical advisors. The schedule and agenda for the conference will be left to the discretion of the EPA official leading the conference, as long as the Respondent receives a reasonable opportunity to address relevant issues.

Following the conference, a written summary of the proceeding must be prepared, signed by the Agency official who presided over the conference. ^{The written statement should contain:} ~~????????????????~~

- a statement of the date(s) and attendees of any conference(s) ^{held} ~~?????~~; and
- A description of the major inquiries made and views offered by the Respondent contesting the terms of the Order.

In addition, the presiding official must prepare a statement which addresses the significant arguments raised by the Respondent and which recommends whether and how the Order should be modified, together with the reasons therefor.

D. Modification, Revocation, or Stay of the Order

Based upon a review of the file upon which the Order initially was based, any probative information or argument proffered by the Respondent following receipt of the Order, and the recommendation of the presiding official, the issuing official may modify or revoke the Order. Any modification to the Order must be communicated to the Respondent as part of a copy of a written statement containing the elements listed in Subpart C above. The original should be kept in the Agency files along with the evidence supporting the order, copies of written documents offered in rebuttal by the Respondent during the conference, and a copy of the request for a conference.

The issuing official may also stay the effective date of the Order if the conference process could not be completed within the specified time period. Before substantially modifying or revoking an Order, the issuing official must consult with the appropriate Headquarters or Regional counsel and obtain the 22221.

VIII. Procedure If Order Is Not Obeyed

In the event the party to whom the Order is issued does not comply with its terms, the Agency must quickly decide whether to attempt to enforce the Order by referring the case to the Department of Justice for filing of a suit to force compliance, or whether to undertake cleanup of the site by use of CERCLA funds, and then file suit against the party for reimbursement of the costs expended plus statutory penalties for failure to comply with the Order.

Students of H. Denny Hall.

The determination of which action to pursue depends on the type of response action to be taken. Obviously, if an immediate removal action is required by the hazard at the site, EPA will clean up the site and attempt recovery of costs and penalties in a subsequent recovery action. The same course of action applies to a planned removal where the removal action must be quickly undertaken and cannot await the filing of a suit. However, planned removal or remedial responses which required an extended period of time to perform, and in which initiation of action may be delayed for a brief period without jeopardizing human health and the environment, may allow sufficient time for the filing of a suit to enforce the Order, or at least that portion of the Order which calls for the planned removal or remedial action to be taken.

Other factors which may enter into this determination include the strength of evidence and the financial ability of the party to perform the desired response activity. The decision of which option to pursue is initially to be made by the Regional Administrator, in the same manner and using the same procedures as previously prescribed for any other enforcement action. The Regional Administrator's recommendation is then forwarded to Headquarters for action.

IX. Note or Purpose and Use of This Memorandum

The policy and procedures set forth herein, and internal office procedures adopted pursuant hereto, are intended solely for the guidance of attorneys and other employees of the U.S.

Environmental Protection Agency. They are not intended to nor do they constitute rule-making by the Agency, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take any action which is at variance with the policies or procedures contained in this memorandum, or which is not in compliance with internal office procedures that may be adopted pursuant to these materials.

Attached to this memorandum as Appendices A and B are

- A sample letter to a state providing notification of the Agency's intent to issue a §106 Order; and
- A sample Order.

If you have any questions or problems concerning any matter contained herein, please call the Director, ^{OSWER (382-4548)} (222?), (222?), or Russell B. Selman (426-7503) or Steve Leifer ^(222?) of the Office of Legal and Enforcement Policy. ⁽³⁸²⁻⁴⁵⁴⁸⁾

Attachments

Appendix A

STATE NOTIFICATION LETTERCERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. R. Jones
State Agency
Division of Environmental Control

Dear Mr. Jones:

Enclosed for your information is a copy of an order (stamped "DRAFT" and "CONFIDENTIAL") that the Agency intends to issue on or after (date), to the XYZ Company, pursuant to Section 106(a) of the Comprehensive Environmental Response Compensation, and Liability Act of 1980, (42 USC 9606). The order requires certain activities to be taken at the company's site located at (location). Please refer to the enclosed copy of the proposed order for the specific actions required of the company and the time within which such actions must be taken. If you have any comments or questions concerning the order, please contact (EPA official) at (office).

Sincerely yours.
Assistant Administrator for
Solid Waste and Emergency Response

(or)

Regional Administrator
(or their designees)

Enclosure

cc: Honorable J. Smith, Governor

Appendix B

SAMPLE ORDER

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of)
(Name of Person,)
Firm or Corporation))

Docket No. _____

Proceeding Under Section 106(a) of the)
Comprehensive Environmental Response,)
Compensation and Liability Act of 1980)
(42 USC Section 9606(a)))

ORDER

The following Order is issued on this date to (insert name and address of person, firm or corporation, along with facility name or place of business if the Respondent is not the owner or operator) ("Respondent(s)"), pursuant to §106(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) (42 USC 9606(a)), by authority delegated to the undersigned by the Administrator of the United States Environmental Protection Agency (EPA). Notice of the issuance of this Order has heretofore been given to the State of _____.

There is an imminent and substantial endangerment to the public health and welfare and the environment due to a (threat of a release) (release) of (a) hazardous substance(s) as defined in §101(14) of CERCLA (42 USC 9601(14)), from the following location (the "Facility"):

(insert legal description, if known;
otherwise, use street or route address)

This order directs you to undertake action to protect the public and the environment from this endangerment.

FINDINGS AND CONCLUSIONS

1. (Choose one or more of 1A through 1E, as appropriate under the factual situation of the case. Do not include headings.)

1A. [((Present Owner)-Respondent is now, and has been since ____ 19__, the (owner) (and) (operator) of the Facility, as determined from (source or information)).]

1B. [((Former owner/operator) - Respondent was, from ____ 19__, until ____ 19__ the (owner) (and) (operator) of the Facility, as determined from (source of information). During that time hazardous substances, including those described herein, were disposed of at the facility. Respondent sold or otherwise transferred and conveyed the Facility to ____ on ____ 19__, according to (property records)).]

1C. [((Generator) - Respondent (disposed of) (arranged, by contract or agreement, for the disposal or transport for disposal) of hazardous substances at the Facility as determined from (source)).]

1D. [((Transporter) - Respondent chose to accept hazardous substances for transport to, and disposal at, the Facility as determined from (source)).]

1E. [((Other Party) (Insert reasons why ordered actions are necessary to facilitate the abatement of the hazard, prevent the aggravation of the hazard, or otherwise protect the public health and welfare and/or the environment.))].

2. (Describe the nature of the facility.)

3. On or about the ____ day of ____, 19__, an inspection of the Facility was conducted by ____ (names)__, (a) duly authorized representative(s) of (EPA, State agency). At the time of that inspection, the inspectors observed the following conditions existing at the Facility:

- A. Approximately 1000 drums of liquid, semi-solid and solid material, which were leaking, without covers and in various stages of corrosion, rusting and other deterioration, located directly on the ground. Material leaking from said drums was observed running approximately 25 yards across the site into Crystal Creek, which adjoins the Facility, and which is a tributary of Pristine River, a navigable water. According to records at the Facility, materials contained in the drums include:

(describe hazardous substances)

- B. An area in the Facility (the "Landfill area") of approximately four (4) acres in size, without vegetation, from which leachate was observed flowing approximately forty (40) yards into Crystal Creek. Vegetation had been killed in the area of the leachate.

According to records at the Facility, the following hazardous substances had been placed in the Landfill area:

(List hazardous substances-
then continue with the following)

At the time of the inspection, _____ samples of the drummed waste, samples of the leachate from the Landfill area, and _____ samples of (soil, surface water, groundwater, air, etc.) were obtained by the inspector(s).

4. An analysis of the samples taken at the time of the inspection disclosed the presence at the Facility of the following substances in the concentrations set forth:

(list hazardous substances and concentrations confirmed by analysis - then continue with following sentence)

These substances are "hazardous substances" as defined in §101(14) of CERCLA, and are subject to the terms and provisions of that Act.

5. The hazardous substances described above are treated or disposed of at the Facility in such manner that they (are being) (threaten to be) released and discharged from the Facility into the (soil, groundwater, surface water, air, etc.) and other parts of the environment.

6. (Describe population or environment at risk and route of exposure). Exposure to said hazardous substances may cause illness, disease, death or other harmful effects to plant and animal life and humans.

7. The (release) (and/or) (threat of release) of said hazardous substances may present an imminent and substantial endangerment to public health and welfare and the environment.

8. In order to protect human health and welfare and the environment, it is necessary that action be taken to contain and terminate the (release) (and/or) (threat of release) of hazardous substances from the Facility into the environment.

ORDER

Based upon the foregoing determinations and Findings of Fact, it is hereby ordered and Directed that:

(Note - the Respondent may ^{may be} be ordered to undertake any response activity that ~~2222~~ required to protect public health, ~~222222~~ the environment, including, but not limited

before and

to, ~~2222~~ those actions which the government is authorized to carry out under CERCLA.)

(Insert here the response actions which EPA directs the Respondent to take at the site. Each activity, (i.e., redrumming of waste, construction of fencing, levees, submission of plans for installation of monitoring wells, etc.), and the date for compliance with each activity, should be listed separately.)

(Insert a statement to the effect that other orders or action may follow.)

EFFECTIVE DATE - OPPORTUNITY TO CONFER

This Order is effective on the twentieth calendar day following receipt thereof by Respondent, and all times for performance of response activities ~~2222~~ be calculated from that date. (Note: For immediate removal situations, the effective date will be considerably abbreviated.)

You may, within ten calendar days after receipt of this Order, request in writing a conference with (Official) to discuss this Order and its applicability to you. (Note: For immediate removal situations, the time for requesting a hearing will be abbreviated. In addition, the Respondent should be informed that he or she may make an oral request for a conference, to be followed up by written notice within two or three days.)

At any conference held pursuant to your request, you may appear in person and by attorney or other representatives for the purpose of presenting any objections, defenses or contentions which you may have regarding this Order. If you desire such a conference, please contact (name, title, address and telephone number of EPA contact) within the time set forth above for requesting a conference.

you under §106(b)

§ in original

(32)

OSWER = 9833.0

PENALTIES FOR NON-COMPLIANCE

occurs

§9606(b)), to a civil penalty of not more than \$5000

Respondent is advised that willful violation or failure or refusal to comply with this Order, or any portion thereof, ~~???~~ may subject ~~????????????????~~ of CERCLA, (42 U.S.C. ~~????~~ ~~????????~~) for each day in which such violation ~~???~~ or such failure to comply continues. Failure to comply with this Order, or any portion thereof, without sufficient ~~???~~ subject you under ~~???~~ §107(c)(3) of CERCLA (42 U.S.C. §9607(c)(3)), to liability for punitive damages in an amount up to three times the amount of any costs incurred by the government as a result of your failure to take proper action.

loss, may

WITNESS my hand in the City of _____, State of _____, as (title of authorized EPA issuing official, on this _____ day of _____, 19____.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

By: _____